United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7005

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

No. 76-7005

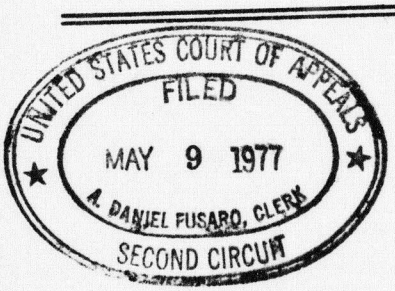
EAST HARTFORD EDUCATION ASSOCIATON, ET AL
Appellants

v.

BOARD OF EDUCATION OF THE
TOWN OF EAST HARTFORD, ET AL
Appellees

On Appeal From the United States District Court
for the District of Connecticut

REPLY BRIEF FOR THE APPELLANTS
ON EN BANC RECONSIDERATION



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PRELIMINARY STATEMENT

Since most of the arguments made in appellees' brief on en banc reconsideration have already been fully discussed in our brief to the panel, our opening brief on en banc reconsideration and the majority opinion of the panel, no extensive reply is necessary. We do, however, wish to make two points.

Argument

I. The First Amendment protects both "political" and "non-political" forms of symbolic speech

Appellees urge that Brimley's tielessness cannot be classified as "political" dissent, and that accordingly it is not entitled to First Amendment protection. The Supreme Court, however, has not limited First Amendment protection to "political" speech. See Thomas v. Collins, 323 U.S. 516, 531 (1945) ("The First Amendment gives freedom of mind the same security as freedom of conscience (citation omitted). Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and of free press are not confined to any field of human interest.").

Thus, only a few days ago the Court handed down the latest in a line of decisions holding that the First Amendment protects even commercial speech. Linmark Associates, Inc. v. Township of Willingboro, 45 U.S.L.W. (May 2, 1977). In Linmark the Court struck down as repugnant to the First Amendment a municipal ordinance forbidding the placing of "for sale" signs on residential property, even though the justification for the policy was an effort to promote racial integration. Linmark Associates, Inc. v. Township of Willingboro; See also Virginia State Board of Pharmacy v. Virginia

Citizens Consumer Council, 96 S.Ct. 1817 (1976) (striking down a statute prohibiting pharmacists from advertising prices); Bigelow v. Virginia, 421 U.S. 809 (1975) (invalidating a statute prohibiting advertisements by abortion clinics).

We pass the question whether criticism of the social order - as distinguished from criticism of the government which constitutes its formal embodiment - is "political." The First Amendment affords protection to such speech regardless of the answer to that question. The core principle of the First Amendment is to protect "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion," Roth v. United States, 354 U.S. 476, 484 (1957). Controversial and unorthodox ideas may involve manners and morals as well as politics.

Thus, a state cannot, consistently with the First Amendment, bar exhibition of a motion picture because that picture advocates the idea that adultery under certain circumstances may be proper behavior. Kingsley Corp. v. Regents of University of New York, 360 U.S. 684 (1959). As the Supreme Court said in Kingsley (360 U.S. at 688-89): ". . . the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has thus struck at the very heart of constitutionally protected liberty." 360 U.S. at 688. Rejecting the notion that the state's action was justified because the motion picture attractively portrayed a relationship which was contrary to the moral standards of the community, the Court ruled that the guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by the majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."

Id. at 689.1/

We doubt that appellees would seriously dispute that an ordinance forbidding criticism of "establishment conformity" would be just as unconstitutional as one prohibiting criticism of the city council. The Constitution protects the right to criticize hypocrisy and greed among the rich and Babbitry in the middle class.2/

If direct criticism of the establishment is protected speech, it should make no difference that the criticism is symbolic in nature. It is difficult to perceive the rationale for a rule extending First Amendment protection to the direct expression of unorthodox non-"political" ideas, but protecting the symbolic expression of unorthodox ideas only when those ideas are "political." The First Amendment makes freedom of expression "the rule" and there must be justification for making an exception to the rule. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). See also, Doran v. Salem Inn, 422 U.S. 922, 933 (1975).

1/See also Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 ("It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right cannot be constitutionally abridged either by Congress or the FCC")(emphasis added). Accord, Columbia Broadcasting System Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973).

2/Appellees do suggest that Brimley's tielessness might be entitled to First Amendment protection if it were related to a "matter of . . . public controversy." (p.9). But surely the First Amendment secures the right to provoke "public controversy" by expressing an unorthodox idea as well as the right to react to a controversy already existing.

II. Under Appellees' policy, Appellant would become an instrument for fostering public adherence to an ideological point of view he finds unacceptable, contrary to the decision of the Supreme Court in Wooley v. Maynard, 45 U.S.L.W. 4379 (April 20, 1977).

We show below that the Supreme Court's recent decision in Wooley v. Maynard, 45 U.S. L.W. 4379 (April 20, 1977) decided subsequent to appellant's opening brief on en banc reconsideration, provides additional support for appellants' position that the trial court erred in granting judgment on the pleadings.

In Wooley, the Court ruled that the State of New Hampshire could not constitutionally require citizens to display the state motto "Live Free or Die" upon their vehicle license plates. The court perceived a threat to First Amendment values in that the State "forces an individual as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." 45 U.S.L.W. at 4382. Moreover, the Court found that the state's primary interest in perpetuating the requirements was not ideologically neutral and therefore could not outweigh the plaintiff's First Amendment rights. As the court concluded:

> "The state is seeking to communicate to others an official view as to proper 'appreciation of history, state pride, [and] individualism.' Of course, the state may legitimately pursue such interest in any number of ways. However, where the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message (footnote omitted)" 45 U.S.L.W. at 4382.

Appellees contend that the requirement that male teachers wear ties will provide "a role model which will help to prepare students for the business and professional community." Appellees' brief on en banc reconsideration at 7.

This "role model" justification embodies the notion that the teacher, by wearing a tie, will convey to his students the message that they should imitate his behavior. In this way the Board is making the teacher the "courier" for its message.

Undoubtedly the school authorities may require teachers in their employ to convey many informational messages to students. But it may not, as we stressed in our opening brief on en banc reconsideration, use the school system to establish an orthodox view on a matter of social or political controversy. It cannot do this by forcing a teacher to proselytize such a view verbally. Nor can it accomplish the same purpose by requiring the teacher to serve as an ideological courier. For example, a New Hampshire school board presumably could not require a teacher to wear the motto "Live Free or Die" in his classroom. Neither can a Connecticut school board require a teacher to proselytize, as a "role model", for the "value" of wearing a tie.

To uphold the Board's rationale would be to sanction official perpetuation of the "value" of wearing a tie - with school boards moulding generation after generation of employers who hold that value and students who conform. We submit that this is not the proper function of a school system under our Constitution.

Nor is the Board's case strengthened by its suggestion that wearing a tie will benefit students in the business and professional community. By parity of reasoning, the Board could require a teacher to serve as an ideological courier for the

principles of the Republican party by wearing an elephant symbol on his lapel on the theory that as Republicans, his students will do better in the business and professional world. A school board is not entitled under our Constitution to indoctrinate students with an ethic of social conformity any more than with a political ideology, even if it concludes that such indoctrination will benefit them financially.1/

Respectfully submitted,
Appellants
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1/We recognize that in Maynard v. Wooley, the Supreme Court reserved the question whether the plaintiff's action in taping over the motto on the license plate was "sufficiently communicative to sustain a claim of symbolic expression . . ." 45 U.S.L.W. 4381, n. 10. See Spence v. Washington, 418 U.S. 405, 410-411 (1974). United States v. O'Brien, 391 U.S. 367, 376 (1968). We acknowledge that at some point what is asserted to be symbolic speech may lack sufficient elements of communication to enjoy First Amendment protection. But this is not an issue to be decided without a factual trial to determine whether the speaker intends to convey a particularized message and the likelihood that it would be so understood by the audience.. See Spence v. Washington, supra. In the present case, Brimley - like the defendant convicted in the Spence case - asserts an intent to convey a specific message, and we submit that this Court in the absence of any factual development concerning how his actions would be understood by his students, cannot say, as a matter of law, that the requisite elements of communication are lacking. Moreover, the policy would require Brimley to wear a tie even if he were to verbally explain the meaning of his symbolic expression to his students. Hence, at the very least the policy may be overbroad.

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BOARD OF EDUCATION OF THE TOWN OF
EAST HARTFORD, ET AL

Appellees May 6, 1977

PROOF OF SERVICE

This is to certify that I mailed the Reply Brief For The Appellants by putting two copies of the same in properly addressed envelopes, postage prepaid, on the 6th day of May, 1977, to Brian Clemow, Esquire and Coleman H. Casey, Esquire, of Shipman and Goodwin, 799 Main Street, Hartford, Connecticut 06103

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